(1) Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

TIMOTHY P. FRYE, **Petitioner**,

v.

FREDERICO PENA, Secretary,
Department of Transportation
LINDA H. DASCHLE, Acting Administrator
Federal Aviation Administration,
NICHOLAS G. GARAUFIS, Chief Counsel,
Federal Aviation Administration,
LORETTA E. ALKALAY, Asst. Chief Counsel
Eastern Region, Federal Aviation
Administration
NATIONAL TRANSPORTATION SAFETY BOARD,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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May 2000

30pp

QUESTION PRESENTED

Was it an abuse of discretion for the District Court to impose Fed.R.Civ.P.11 and 28 U.S.C. § 1927 sanctions in the amount of $35,696.19, order forfeiture of a $20,000 bond filed by plaintiff for purposes of discovery, and disbar counsel in the District of Arizona, when the two causes of action were undeniably true, and Plaintiff was denied the opportunity to take depositions that would have proved their validity?

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Abbreviations:

DCSO — Dist. Ct. Rule 11 Sanction Order
DCDO — Dist. Ct. Dismissal Order
DCSD — Dist. Ct. Order staying discovery and imposing $20,000 bond
CMP — Complaint, Frye v. Pena

* * * * *

Petitioners Timothy P. Frye and his attorney Lawrence B. Smith, respectfully pray, that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding October 22, 1999.

CITATIONS

Frye v. Pena, (unpublished) 199 F.3d 1332 (9th Cir. 1999); 1999 WL 974170. District Court Order imposing sanctions, 1997 WL 659817. (All relevant opinions are printed in the Appendix, A-00.)

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit sought to be reviewed was entered October 22, 1999; A-1. Order denying rehearing and suggestion for rehearing en banc, entered January 12, 2000; A-3. Jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1). Application No. 99A790 was granted by Justice O'Connor March 23, 2000, extending time for filing from April 12, 2000 to May 11, 2000. Jurisdiction of the United States District Court, District of Arizona, based on 28 U.S.C. § 1331.

RULES AND STATUTES INVOLVED

Fed.R.Civ.P. 11, A-49
Fed.R.Civ.P. 12(b)(6), A-51.
Admin. Procedure Act, 5 U.S.C. —
§ 551(4), A-52.
§ 552(a)(1)(D) & (E), A-52.
§ 553, A-53.
§ 558(a) & (b), A-54.
§ 706, A-55.
28 U.S.C. § 1927, A-55.
Federal Aviation Act of 1958:
§ 609, A-56.
§ 901(a)(1) & (2), A-57.
§ 903(b)(1), A-57.

STATEMENT OF THE CASE

The Federal Aviation Administration initiated a punitive certificate sanction action against Plaintiff Timothy P. Frye and

Petitioner here, an Air Transport Pilot. Claimed authority was the Federal Aviation Act of 1958 (FA Act), section 609(a), now codified in 49 U.S.C. § 44709 (1994) (formerly codified as 49 U.S.C. § 1429(a) (1992), which is an accurate restatement of the FA Act.). His ATP was suspended for 90 days. (Reduced from 180 when it was explained to FAA counsel that two of the three charges of unairworthiness were false on their face). Remaining was the charge that he departed when the left outboard landing light bulb was missing. (Fact: it is legal to operate the aircraft with two of its four landing lights inoperative, as long as one is an inboard light; fact, the departure would have been perfectly legal had Nation's Air, which had leased it, was operating the plane.) On behalf of his employer, Capt. Frye was repossessing a Boeing 737 from Pittsburgh International Airport. Details are laid out in the Complaint ¶¶ 8-15. CMP A-44-46.)

Capt. Frye was represented by Washington counsel in the administrative action before the National Transportation Safety Board. The FAA Office of Chief Counsel, even though regional counsel had won the case before the Administrative Law Judge, rather than respond to Capt. Fry's brief on appeal to the full Board, dropped the case. Legal fees and costs came close to $100,000, about twenty-five percent of that for the district court action underlying this case. Even though Capt. Frye was not guilty of violating an airsafety rule. Throughout the FAA-NTSB case, to protect his right to fly and avoid the threat to his career as a major airline pilot, he would have paid a compromise civil penalty of up to $2000 to end that threat.

As the Question Presented indicates, Capt. Frye's counsel was severely sanctioned and the plaintiff's bond forfeited.

Issues of the case-in-chief — Early on, this attorney, on behalf of Capt. Frye, initiated an action in United States District Court, District of Arizona (CMP, A-43, et seq.), to have the action taken against Capt. Frye declared unconstitutional on two grounds: (1) FAA has no authority to impose license penalties because the executive branch, not the Congress, created license penalties; (2) the agency has no rule for that warns pilots that a

safety violation may lead to such a penalty. Capt. Frye also sought a preliminary injunction.

REASONS FOR GRANTING THE WRIT

Exceptional Importance — The United States Court of Appeals for the Ninth Circuit has sanctioned a departure from the accepted and usual course of judicial proceedings by the District Court so serious, as to call for the exercise of the Court's supervisory power. **Sup.Ct.R.10(a)**.

In filing its motion to dismiss, GMDS, A-57), the government failed to follow the mandates of the Federal Rules of Civil Procedure. It filed a Fed.R.Civ.P.12(b)(6) motion but totally failed to explain why the two basic causes of action failed to state claims upon which relief can be granted. The first cause charges that the executive branch created the policy of using license suspensions and revocation for the violation of airsafety rules, not the Congress, ergo, there is no statute that even hints at such a penalty. The second, besides no statute, the agency has never promulgated any rule that warns pilots and mechanics that it claims that power and authority. In short, there is no language in any official federal publication that even hints at the agency can use license penalties, rather than civil fines.

The District Court failed to follow the mandates of Fed.R.Civ.P.12(b)(6) and considered matters outside the complaint, but did not order the government to convert its motion to dismiss to a Fed.R.Civ.P.56 motion for summary judgment. By denying Plaintiff the right to take depositions, Fed.R.Civ.P.11 was also violated. This Court expressly amended that rule in 1993 to make certain that before the attorney was sanctioned he would have had the opportunity to do discovery. This is a classic case on the matter and in our view the federal judiciary should be reminded that these rules mean what they say. These rules are, of course, the backbone of assuring the citizen he will have his day in court.

The Court should also consider the importance of what Capt. Frye's counsel has been trying to do: bring to judicial recognition that a major system of punitive administrative

justice has no basis in law. FAA lawyers admit that most are inadvertent and ninety-nine percent plus are first offenses. FAA has advised this attorney that one million *active* pilots and mechanics hold FAA certificates. We estimate there are two to three thousand small operators, air-taxis, repair stations and the like, which also hold certificates subject to suspension and revocation strictly for airsafety violations. In fact even the large airlines are.

Another important reason for the Court to grant this petition is it will become aware from what has happened to Capt. Frye's attorney that **any lawyer seeking to vindicate the constitutional rights of his pilot-client will be discouraged from attempting to do so.** This, even though the facts here are indisputable. And we assure the Court that it is only the courts that can rectify these constitutional violations.

This is truly an extraordinary case — These are the unassailable facts:

(1) There is no language in any official federal publication — United States Code, Code of Federal Regulations, that even hints these certificates can be suspended or revoked as a penalty for the violation of an airsafety rule.

(2) Not only has there never been a statute, but no bill has ever been introduced in Congress to establish such penalties, consequently no legislative history.

(3) There once was a plain-spoken rule, beginning in 1926, but it disappeared in 1940 and none has taken its place. Why?

(4) Consequently, neither through Congressional hearings nor Administrative Procedure Act (APA) rulemaking procedures, has Congress or public had any say in the creation of FAA license penalties.

It may seem strange that proving this would be so difficult, when any judge's clerk can determine these facts with a modest amount of research in a law library, especially by using the search function in WestLaw or Lexis. This attorney, at least a dozen years ago, based on how government counsel consistently sidestepped the issues, realized that the only way these facts could be proven was to depose FAA lawyers. **How**

else can one find out how a system of punitive administrative justice works if there is nothing in any official federal publication that even hints at it, *except* by deposing those who know how it does — FAA lawyers?

At stake here is not only the integrity of the law practice, especially where the lawyer is working by the rules to bring to full consideration to an issue of enormous public importance, but the integrity of the Federal government itself is at stake. Thus we respectfully request the Court to exercise its inherent authority, expressed in Sup.Ct.R. 15(1), and order the Solicitor General to file a brief in opposition to this petition. Perhaps then this Court and the public can have an explanation in plain English of why there is no statute, no rule.

ARGUMENT

Standards — Capt. Frye's counsel was sanctioned under Rule 11 (A-49) and 28 U.S.C. § 1927 (A-55), as was the order of forfeiture of Plaintiff's $20,000 bond posted for purposes of discovery. Sanctions under Rule 11 and § 1927 are reviewed under the abuse of discretion standard. *Cooter & Gell v. Hartmarx Corp.* 496 U.S. 384, 405 (1990).

The sanctioned attorney's burden under Rule 11 is to demonstrate the following: 11(b), the causes of action were asserted "after an **inquiry reasonable under the circumstances**"; 11(b)(1), were not **"presented for any improper purpose"**; 11(b)(2), "are **warranted by existing law or the establishment of new law"**; and 11(b)(3) "the **allegations and other factual contentions have evidentiary support,** or after a reasonable opportunity for further investigation or discovery . . ." As to section 1927, did he **multiply the proceedings "unreasonably and vexatiously"** so as to support disbarment and an extreme money sanction? Or any sanction, whatsoever?

Preface— In its dismissal order the District Court said: "The Court finds that the Complaint asserts broad constitutional challenges . . . If the Court were to agree with Frye, it is possible that the Court might find it " just" to award monetary

damages." DCDO, A-28.[1] (No damages were sought.)

FIRST CAUSE OF ACTION[2]

20. The FAA's claim of authority to punish an airman for the alleged violation of a safety regulation by suspending his pilot's license is based on the Federal Aviation Act, § 609 **[Page 5]** (FA Act), 72 Stat. 779-80. The contention is that certain language in that section authorizes the FAA Administrator to suspend or revoke certificates anytime he deems "that safety in air commerce or air transportation and the public interest requires . . ."
21. Based upon this vague language federal aviation officials decided that it was in the interests of air safety to impose suspensions and revocations on certificate holders as punishment for safety violations—obviously figuring that no one could argue with the logic of that. This, even though no language is contained in Section 609 that so much as hints at a connection between the commission of a safety violation and suspension or revocation of a pilot's license, or any other certificate; no words, such as, "regulation," "violation," "sanction," or "penalty."
22. Thus, based on these officials' own statutory interpretation, logic dictates that the executive branch of the federal government, not the Congress, created certificate penalties. It is fundamental under Article I, § 1, of the Constitution that only the legislative branch of the federal government, not the executive, may create penalties, or benefits, *i.e.* food stamps. Thus the imposition upon Capt. Frye of a

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1 Does this not indicate the District Court is saying that the causes of action state claims upon which relief can be granted, and should have required the government to file an answer or motion for summary judgment? This is the first time in the many cases counsel has been involved in that *any* court has ever acknowledged this.

2 We urge the Court, before reading what follows, to read Counsel's U.S. General Accounting Office memo sent to the FAA Office of Chief Counsel in June 1980. GAO, A-90.

suspension of his pilot's license as a penalty for alleged air-safety violations violated his Fifth Amendment right to due process. [CMP A-48.]

* * * * *

FA Act § 609, in pertinent part, reads:[3]

> (a) The Administrator may, from time to time, **reinspect** any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may **reexamine** any civil airman. If, as a result of any such reinspection or reexamination, **or if, as a result of** any other **investigation** made by the Administrator, he determines that safety in air commerce or air transportation and the public interest requires, the Administrator may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate.

72 Stat. 779-80 (emphasis added.) (A-56).

A statute is unconstitutionally vague if persons of "common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926), *see also, Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("Vague laws offend several important values.") Do not government and courts owe airmen an explanation of how section 609 meets this test? Does not this standard apply also to agency rules?

This first cause of action was drafted with this specific APA

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3 This was accurately codified in 49 U.S.C. § 1429(a) (1992). However, during a recodification of all transportation law, it became 49 U.S.C. § 44709 (1994). The phrase "if as a result of" was dropped without any amendment to the Act authorizing it. Everything that follows it is a condition subsequent to first reinspecting and reexamining. It is really a grant of power for the Administrator *not* to take action if he deems it is not to be in the public interest.

mandate in mind:

> (a) This section applies, according to the provisions thereof, to the exercise of a power or authority.
>
> (b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to agency and as authorized by law. * * * * (A-54)

5 U.S.C. § 558 (a) & (b). Where does any act of Congress authorize suspension or revocation of a pilot's license for violation of a safety rule? The APA legislative history could not be more explicit:

> This provision, limiting administratively imposed requirements to the authority granted and delegated, is designed to afford statutory recognition for the basic rule of law, embodied in judicial decisions. ***The creation of penalties or benefits is exclusively the province of Congress.*** * * * *
>
> [It] means that agencies may not undertake anything which statutes or other adequate sources of authority (such as treaties) do not authorize them to do. Where these sources are specific in the authority granted ***no additional authority may be assumed. . . . Sanctions in the way of penalties or relief must be identified and authorized by law****, and where authorized they must in any case apply in the factual situation presented.*

S. Rep. No. 248, 79th Cong., 2d Sess. 34 and 274 (1946) (emphasis added).

Where does section 609 even hint at sanctions for violations?[4] Where is any legislative history? Any history that explains the language about air safety and public interest? FAA

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4 A thorough history of FAA enforcement may be found in this attorney's 42-page law review article: *Smith*, FAA PUNITIVE CERTIFICATE SANCTIONS: THE EMPEROR WEARS NO CLOTHES;. OR, HOW DO YOU PUNISH A PROPELLER?, 14 Transp. L.J. 59-100 (1985) (*"Emperor"*). This was based on the research we were able to do during a 1980 six-months consulting contract with the U.S. General Accounting Office on the legal aspects of FAA enforcement.

officials contend that is a broad grant of power for the Administrator to impose punitive certificate sanctions when he (meaning the officials to whom he delegates his authority) deems it to be in the interest of the public and air safety. NTSB has recognized the obvious, but refuse to do anything about it: "***This statute [609] does not explicitly state that the Administrator may suspend a certificate for violations of the FAR***," *Adm'r v. Komjathy*, NTSB Order No. EA-2343, July 14, 1986 (emphasis added); *see also*, *Komjathy v. National Transp. Safety Bd.*, 832 F.2d 1294 (D.C. Cir.) (per curiam), *cert. denied*, 486 U.S. 1057 (1988) (one of counsel's cases).

"Where these sources are specific in the authority granted *no additional authority may be assumed.*" If section 609 says nothing that hints at license penalties, then who else but the executive branch could have ***created*** the penalty? In its Motion to Dismiss the government admits that such sanctions are based upon an ***interpretation*** of the FA Act: "The interpretation of a statute by the agency charged with its administration generally is entitled to 'great deference.'" A-68. If the statute has to be "interpreted" by an agency in order to find authority for license penalties, then who else but the executive branch could have created the policy?

> The FA Act provides that:
>
> (a)(1) Any person who violates (A) any provision of titles III, V, VI, VII, or XIII of this Act, or any rule, regulation or order issued thereunder * * * shall be subject to a civil penalty of not to exceed $1,000 for each such violation * * *

72 Stat. 783, § 901(a)(1) (A-57). Previously codified in 49 U.S.C. § 1471(a)(1) (1992), it is now 49 U.S.C. § 46301 (1994); *see also* 49 U.S.C. § 1155 (1994). During recodification it too had its language changed in a critical aspect, also without authorization from Congress. The recodification reads: "*Any* person" is now "*A* person"; and "*shall be*" has become "*is*

liable."[5] Is section 901 of the Act's language not specific enough? Are not pilots entitled to an explanation by the government and courts as to why the section does not mean what it says in plain English?

The FA Act presents another conundrum:

> (1) Any civil penalty imposed or assessed under this chapter may be collected by proceedings in personam against the person subject to the penalty * * *. Such proceedings shall conform as nearly as may be to civil suits in admiralty * * * [and] **either party may demand trial by jury of any issue of fact**, if the value in controversy exceeds $20, and the facts so tried shall not be reexamined other than in accordance with the rules of the common law. * * * * [Language right out of the Seventh Amendment.]

72 Stat. 786, § 903(b)(1) (emphasis added). Previously accurately stated in 49 U.S.C. § 1473(b)(1) (1992), it is now in 49 U.S.C. § 46305 (1994). Thus it can be seen that the FAA decides whether or not a pilot charged with an airsafety violation can ever exercise his right to jury trial for "any violation"simply by placing the case on the 609 administrative track, rather than the civil penalty. (Confirmed by veteran FAA enforcement lawyer, John E. Marsh, Jr., *infra*.

How did all this came about? It is explained in *Emperor* in detail. Briefly, it all traces back to *Wilson v. Civil Aeronautics Board*, 244 F.2d 773 (D.C. Cir. 1957). *Wilson* is the touchstone for every 609 case thereafter. In an opinion, less than a page

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5 The government seems to have gone out of its way to assure the courts that this change, as well as the "if as a result of," referred to in footnote No. 3, was proper. In their motion to dismiss, footnote No. 1 (A-60), they said:

> 1 In 1994, Congress recodified the Act without substantive change at 49 U.S.C. §§ 40101 (1994), et seq. See Pub. L. No. 103-272, 103 Stat. 745, 1093 (1994). All references will be to the recodified Code sections.

Dropping "any person," "shall be," and "if as a result of," can hardly be said not to be "substantive" changes. Congress has never made such changes.

long, the District of Columbia Circuit held that section 609 of the Civil Aeronautics Act of 1938, 52 Stat. 1011 (essentially the same as the FA Act), with its language about public interest and air safety, constituted a broad grant of power to suspend a pilot's license as "a deterent sanction." 244 F.2d at 774.

The problem with this is that our research while at GAO uncovered the fact that Justice Department lawyers themselves made clear in their responding brief that **the 1938 Act had nothing to do with the authority claimed**. If true, that means *Wilson* has no validity as precedent. The issue before the D.C. Circuit was whether or not Congress had ever authorized license suspension and revocation for airsafety violations. Any argument would have to be conducted in the time-frame of the year involved, which as will be seen was 1926. One of Plaintiff's requests for admissions makes that clear:

> 68. In *Wilson*, government lawyers argued that section 3(f) of the 1926 Act, not section 609 of the 1938 Act, was the source of the suspension and revocation power for violations. They argued:
>
> > That Act directed the Secretary of Commerce "by regulation" . . ."to provide for the issuance and expiration, and for the suspension and revocation, of registration, aircraft, and airman certificates." (Section 3(f), 44 Stat. 570). There was no statutory specification of the grounds for suspension or revocation, this being a matter obviously left for the Secretary to establish. The first regulations adopted provided for suspension or revocation of licenses on numerous grounds, including "violating any provision of the Air Commerce Act of 1926 or these regulations," and "violating air traffic rules" ("Air Commerce Regulations," December 31 1926, Chapter 4, Sec. 74(a)(b).) [Actually, a & f.]
>
> (Brief for Respondent at 20-21, *Wilson v. Civil Aeronautics Board*, 244 F.2d 773 (D.C. Cir. 1957), (Docket No. 13553). If not available at the Department of Justice or FAA, it is readily available for reading and copying in the federal courthouse at 333 Constitution Avenue, N.W., Washington,

D.C. Excerpts may be found in the Marsh exhibit book previously supplied and mentioned in ¶ 2, supra.) (Cross-ref. No. 31-pp 8-9 of 12).[6]

FAA Assistant Chief Counsel for Enforcement Peter Lynch admitted the accuracy of this quote.(Docket 39, p.63.) It establishes prima facie that the Secretary of Commerce, ***i.e.*, the executive branch, created** license penalties. If that is not true, was it not up to the government to prove differently?

The District Court here, in its dismissal order, brushed all this aside but said that the "[C]ourts have interpreted later enactments as providing a *present* source of authority regarding suspensions or revocations." And called our argument "frivolous" and agreed with the government's characterization that we were playing a "semantic" game. (DCDO, A-31).[7] (All the briefs in *Wilson* were admitted in evidence as Exhibit No. 1 (certified by the U.S. Archives.) Neither District Court nor government has ever indicated what that later source of authority is, much less, quote its language or the case that

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6 Pilot's and mechanic's licenses will be suspended or revoked for--
(A) Violating any provision of the air commerce act of 1926 or these regulations. . . . .
(F) Violating air traffic rules.
Dept. of Commerce, Air Commerce Regulations (1926) Sec. 74. Suspension or revocation of licenses.

With the advent of the Code of Federal Regulations in 1938 Commerce officials republished Sec. 74, but split it up among various functions, like pilots, mechanics. *See* 14 CFR §§ 20.37, 20.37110, 20.46, 20.463, 21.27110 (1938). By 1940, however, these rules disappeared; why they did is explained in *Emperor* at 85-86. There has been no such rule ever since. Neither FAA nor Justice Department lawyers have *ever* explained why such a straightforward rules was appropriate from 1926 to 1939, but not today.

7 The government never even mentioned the executive-branch creation charge, nor section 558(b). What we have here is the District Court in effect making arguments for the defense even though Justice lawyers did not do so. In effect that court became the advocate for the government..

allegedly says so. The history of any bill, which is the only place such a change could have been made, would have to show recognition of the fact that theretofore such authority did not exist, or was so cloudy as to require clarification. Should not Capt. Frye have been able to follow up on this with a deposition of Mr. Lynch and require him to explain what the later authority is? There of course is none, or the government would have supplied it.

Reasonable inquiry — In the record in this case is a 460-page sworn statement, like a deposition, voluntarily given to this attorney by John E. Marsh, Jr. of Alexandria, Va. We worked with Mr. Marsh at FAA in 1967-68. Twenty-one years of his 30 years of government service, were in FAA enforcement, many years as chief of the Enforcement Policy branch. Retired in 1981, he remained active for as a contract instructor for several years at the FAA Academy. He was the Office of Chief Counsel's editor of a complete rewrite in 1980 into one volume of several enforcement manuals. He is the experts' expert on enforcement. We spent several hours with him in early 1996 explaining what was going on in the FAA with all the WWII pilots gone, replaced by youngsters without their experience and judgment. (Marsh was a B-24 pilot.) On February 20, 1996 he gave us his statement, taken down by a court reporter. It took eight intensive hours. We attached copies of the statement to plaintiff's motion to commence discovery by depositions and admissions, filed at commencement of the suit. It was to stop this discovery that defense counsel initiated a phone conference with the court. A separate volume of exhibits, prepared for Marsh's statement, was also submitted. Those were the ones listed in the Appendix at A-79. They are the documents defense counsel claimed were so burdensome.

We will just touch on a few highlights. Marsh agreed that choosing between a civil penalty and suspension sanction was a "troubling decision" and pointed out "That there is nothing historically in the FAA to give you any clear-cut guidance on that." (TR 92) When asked if this "leaves a lot to the subjective determination of the particular individual involved" he said,

"Yes. There's no doubt about that." (TR 104).[8] "Q — [I]sn't it a fact that it's a simple factual statement that if the FAA starts a case as a suspension action, then obviously there is never going to be any jury trial . . . A — Well, yes. If you're talking about a certificate action now, the administrative action substitutes for the jury trial." (TR 154). "Q — . . . [I] mean the fact is we've established that the FAA claim of authority stems from Section 609 and the language about the public interest and safety in air commerce as a broad grant of authority. A — That's right. And the FAA interprets that as Congress' intent to give the Administrator the broadest authority here, to give him very broad authority." (TR 300-07) By this Marsh was of course agreeing that there is no language in section 609 about sanctions for violations — not that anyone's agreement is necessary to establish that fact.

> Q — Well let me put it this simply: The airman, if he commits a safety violation, no qualifications matters involved, the fact is that he will only have an opportunity to have a jury trial and exercise his statutory right to demand a jury trial if the FAA officials who bring the charges decide to put it on the civil penalty track?
>
> A — That's right.

(TR 303) Marsh agreed that if a person with no valid license was caught flying an aircraft, they couldn't use section 609. "Q — That's because you can't do anything else to the person, isn't that correct? A — Well, yes." (TR 98, 140). So the pilot with no valid license who committed a most serious violation gets his right to jury, but one who has one and has committed the same violation is denied it. Is not this something which Capt. Fyre's counsel should have been able to depose Mr. Lynch and other FAA lawyers about?

The incredible situation of an agency lawyer deciding whether or not a citizen can exercise his right to a congressionally mandated jury trial is something we recognized

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8 *See* Nov. 1967 memo from Jennings Roberts. (A-85).

within a few weeks of going to work at FAA in late October 1967. We read all the various aviation acts and came to understand the system's basics. When we asked our branch chief about it, all he would say was, "The courts have approved it." He was of course referring to *Wilson*.

Using the search function on our word processor the only place in the Appendix where section 558(b) is mentioned is in the dismissal order. DCDO, A-30. The government made no mention of it, yet it is as the heart of the first cause of action. Even were there some merit to the District Court's position, how can it be said that what we have laid out here (and in virtually every other court we have been in) is not a reasonable argument?

THE SECOND CAUSE OF ACTION

> 23. Although they have claimed authority to impose license penalties for almost four decades, FAA officials have never given the public any notice of this in the Code of Federal Regulations — or any other official federal publication — that they make such a claim. This failure to tell airmen, including Capt. Frye, that their licenses are at risk for the violation of a safety rule violated his Fifth Amendment right to due process. [A, 48]

* * * * *

As is the first, the second cause of action is strictly governed by the APA, as well as fundamental concepts of due process. Relevant parts read:

> (a) Each agency shall make available to the public information as follows:
>
> (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public —
>
> * * * *
>
> (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
>
> (E) each amendment, revision, or repeal of the foregoing.
>
> ***Except to the extent that a person has actual and timely***

notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. * * * *

5 U.S.C. § 552 (a)(1) (D) & (E) (emphasis added). A-52.. Paragraph (E) is a legislative exclusionary rule.

How can it be argued that the FAA's punitive certificate sanction policy does not meet the APA definition of a rule? It states: "(4) 'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, **interpret**, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency * * *". 5 U.S.C. § 551(4) (emphasis added). A-52

The government freely admits the license penalty policy is based upon an "interpretation" of section 609. GMDS, A-55. So how do they explain section 552? They don't, just ignore the issue.

Although not in the Federal Aviation Regulations (FARs), 14 C.F.R. pts 1-199, *see esp.* Part 13, the use of certificate penalties is spelled out in FAA's enforcement manual: **"Formal legal action is undertaken to -- . . . B. Impose punitive sanctions, after the act, to deter violations (e.g., certificate actions, civil penalties) . . ."** Compliance and Enforcement Program, FAA Order 2150.3A, ¶ 203, (e)(1)(B), p. 14 (1988) (emphasis added). Agency manuals, of course, do not rise to the level of official publications. This Court has squarely held that placing a policy in an agency manual and not having it published in accordance with APA requirements violates that act. *Morton v. Ruiz*, 415 U.S. 199 (1974). "The Administrative Procedure Act was adopted to provide, *inter alia*, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations." *Id.* at 232. "The BIA [Bureau of Indian Affairs] itself has recognized the necessity of formally publishing its substantive policies and has placed itself under the structure of the APA procedures . . ." *Id.* at 233.

As does BIA, FAA policies require agency officials to follow the APA:

> A primary Congressional consideration underlying the Administrative Procedure Act is that a regulatory agency afford the public an opportunity to participate in its rulemaking processes. Both the letter and the spirit of the rulemaking provisions of this act shall be observed. FAA follows the principle that the public interest is best served when regulatory affairs are open to the public to the fullest extent possible.

FAA Rulemaking Policies, FAA Order 2100.13, ¶ 22 (a) at p. 8 (1976). This Order also provides that the Office of Chief Counsel is responsible for "determining the legal adequacy of agency actions related to rules and regulations. . . .[and] Reviewing **internal directives and advisory circulars to assure they are neither used for nor have the effect of regulations and are consistent with the regulations.** Id. at ¶ 22(a) & ¶ 33(b) (emphasis added.). Would this not be a key FAA order about which Capt. Frye's attorney should have had the opportunity to question FAA lawyers about in order to determine agency compliance with it — and with the APA?

In the only such FAA administrative case we are aware of, the Civil Aeronautics Board squarely upheld the need to have rules. The FAA has a rule in their manual which they use as the basis to revoke airman and operators when they are charged with one or more safety violations, but not for failing, for instance, a reexamination, a true qualifications matter. They contend that the airman, for instance, lacks the "care, judgment and responsibility" required of a certificate holder and, *therefore*, the qualifications to hold it.

They used it at least once to deny an application for a student license. *See Petition of Sichel*, 39 C.A.B. 975, 976-77 (1964). It was made by a pilot whose private license had been suspended, but he was caught flying during that suspension, then revoked. He waited the required period of time and applied for the student license. (He could as well have applied for a private, but evidently thought starting at the bottom was safer.)

The FAA denied the application on the care-judgment basis. His lawyer appealed to the CAB. (NTSB succeeded to its quasi-judicial functions in 1966.) The Board indicated it thought the FAA had the authority to lay down such standards, but said: "I]t does not follow that the administrator may apply such standards to applicants where he has not prescribed [them] . . . in the Regulations. . . . [I]t is our view that applicants for certificates are entitled to have *notice* of the eligibility requirements which they must meet. . . ." *Id.* at 976 (emphasis added). "Notice," of course, is a due process concept, precisely the purpose behind the APA. In a footnote, as further support for its decision overturning the denial and requiring FAA to issue the license, CAB cited the APA. *Id.* at 977 n. 10. (We likely would have never learned of this case except for the fact John Marsh told this attorney about it when we were at GAO.)

Senator Pat McCarron (McCarron Field, Las Vegas), Judiciary Chairman and sponsor of the APA, had this to say (among many similar statements) about his bill:

"[I]t is a comprehensive charter of private liberty and a solemn undertaking of official fairness." S. Rep. No. 248, 79th Cong., 2d Sess. III (1946). "It affords private parties a means of knowing what their rights are and how they may protect them . . ." *Id.* at 250."[The] bill [is] to my mind and to the mind of the bar of America . . . one of the most important measures that has been presented to the Congress of the United States in its history." *Id.* at 297.

The courts: "Any agency regulation that so directly affects preexisting legal rights or obligations . . . indeed, that is 'of such a nature that knowledge of it is needed to keep the outside interests informed of the agency's requirements in respect of any subject within its competence,' is within the publication requirement [of the APA]." *Appalachian Power Co. v. Train*, 566 F.2d 451, 455 (4th Cir. 1977). "Any claim of exemption from APA rulemaking requirements 'will be narrowly construed and only reluctantly countenanced.' [Citing cases]" *Environmental Defense Fund, Inc. v. Gorsuch*, 713 F.2d 802, 816 (D.C. Cir. 1983). There is a plethora of such cases. The

D.C. Circuit noted there is ***"No question that the Penalty Rules fall within the scope of the APA's rulemaking provisions.*** *See* 5 U.S.C. § 551(4)-(5) (1988). . . ." *Air Transport Ass'n of America v. Dept. of Transp.*, 900 F.2d 369, 375-78 (D.C. Cir.) (invalidating FAA rules promulgated to create a civil penalty hearing program); *vacated to determine mootness*, 498 U.S. 1077 (1991) (emphasis added).

How is it that this attorney, since 1985, on behalf of his clients, most of whom were severely hurt by FAA punitive certificate action, can present all or part of the APA bill's history, and quote the APA, to numerous district and courts of appeals, cite cases like those above, and all of them ignore such compelling authorities and fail to explain how the FAA license-penalty policy meets APA requirements? Not even 14 C.F.R. § 13.19, which is a paraphrase of section 609 and which the government and courts seem to contend is an adequate rule, DCSO, A-11, was ever put through the public notice and comment procedure required by 5 U.S.C. § 553. The District Court cites several cases (all of them this attorney's) which hold that "the APA does not require the FAA to promulgate a rule or to publish a policy stating that it may suspend a pilot's certificate for violations of the Federal Aviation Regulations." DCSD, A-38. This a truly incredible statement. Where's the analysis? None exists, or defense counsel and the courts would have certainly cited it. Moreover, as in the instant case, the district courts dismissed before the government ever had to enter an answer or motion for summary judgment.

Reasonable inquiry — Here's what John Marsh had to say about a rule:

> Q — All right, let's talk about the regulations that are not on the books. . . .
>
> One, as a basic proposition, and I submit this as a fact and you can correct me if I am wrong, the FAA has no regulation that tells airmen that if you commit a violation, you can lose your license as a, whatever you call it, sanction, punishment, because air safety requires and so forth? Isn't that a fact?

A — Yes, there is no regulation that spells it out like that. I think every airman realizes that if you violate the FARs, depending on the situation, you could have action against your certificate.

Q — How would he find that out?

A — Other than plain common sense, is all I know Larry. (TR 323-24).

Back in 1988 this attorney asked Senator Dennis DeConcini (D-Ariz.) to request the Administrative Conference of the U.S. (ACUS) to study FAA's two-track system of enforcement. Done by ACUS research director, Jeff Lubbers, and as reported in *Aviation Daily*, these were some of its conclusions: "The study ... concluded that 'the cumbersomeness of the original civil penalty process gave FAA an incentive to use the suspension/revocation track as its primary enforcement tool. This was due to an unfortunate procedural anomaly — the harsher section (revocation/suspension) was easier to invoke.'" *Aviation Daily* at 358, December 8, 1988. "Smith also had contended that FAA should be doing more 'to publicize and disseminate' enforcement policies and procedures, a notion Lubbers found 'more troubling.' He said Congress may want to address the question of the agency's reluctance to provide such explanation because it fears it would be 'swamped with trials' if pilots knew how easy it was to appeal to NTSB. 'Mr. Smith seems to have tapped into a rather rich vein of discontent about FAA's unwillingness to articulate and disseminate its policies in a meaningful way to affected parties. I would hope that this topic would also receive further consideration by Congress and FAA,' Lubbers said." *Id.*

RULE 11 AND RULE 12(b)(6)

Standards — Has the attorney made a reasonable prefiling inquiry into the facts? Is his pleading supported by existing law or a good faith argument to change it? *Hartmarx* at 496 U.S. 399. The government should explain in detail why counsel failed to meet these standards.

Rule 11 is not intended to chill creativity that "is the very lifeblood of the law. Vital changes have been wrought by those

members of the bar who have dared to challenge the received wisdom, and a rule that penalized such innovation and industry would run counter to our notions of the common law itself. *Eastway Const. Corp. v. City of New York*, 762 F.2d 243, 254 (2nd Cir. 1985). "What is at stake is often not merely the monetary sanction but the lawyer's reputation." *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540 (9th Cir. 1986); 809 F.2d 58 (9th Cir. 1987).

Can this be said about Capt. Frye's counsel? "[t]hrough out the pre-trial proceedings plaintiff's attorney continually engaged in obfuscation of the issues, hyperbolism and groundless presumptions" in addition to insinuating that the court was biased." . . . The plaintiff's attorney also refused to produce [evidence] . . ." *Cruz v. Savage*, 896 F.2d 626, 634 (1st Cir. 1990).

"A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. *Hartmarx at* 496 U.S. 405. "What Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of the complaint's factual allegations. District court judges looking to dismiss claims on such grounds must look elsewhere for legal support." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). Is this not precisely what the record here reflects? "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). How can it be said that Capt. Frye could not have proved that the executive branch created license penalties — especially when the government admits the policy is based on a statute that contains not a hint at sanctions, penalties, or rules violations? If there is a rule, all the government has to do is quote its language and explain how any reasonable person would understand what it says.

Having found legitimate constitutional claims, was it not the District Court's duty under Rule 12(b(6) to require the government to convert its motion to dismiss to a Rule 56 motion for summary judgment? Which would have opened up

discovery? Its duty to follow Rule 11(b)(3), which makes clear the attorney should have that opportunity? We can flatly state that if any of the district court cases which are bandied about by the government as meaning something had ever allowed Petitioner and his attorney to take depositions these issues would have been resolved years ago and we would not be here.

We had the greatest respect for the late and Honorable Richard M. Bilby. It was because of that, we persuaded our client and his supporters to put up the $20,000 bond. We believed firmly that once Judge Bilby had the facts, he would let the case go forward. Unfortunately the whole situation was colored by his conviction that we had deliberately lied to him about our failure to remember the extent of his order in any earlier case instructing us not to file any further such. We had no motive to violate that order, in fact would have been far better off to have sought an ex parte order before filing, since we had the Marsh statement by then and would have had Judge Bilby's complete attention. *See* our letter to him at A-75. Unfortunately now at an age where sometimes it is difficult to remember some things, we forgot about that letter, or would have brought it to his attention in this action. Perhaps it would have softened his attitude. (He did have something kind to say: "One mitigating factor is Smith's respectful demeanor at hearings." DCSO, A-17.

In a nutshell the government's strategy in all these cases, district court and petition for review, has been to *never* deal with the causes of action and the issues they raise, but always to immediately embark on a discourse about section 609, implying that statute covers all sins. Their motion to dismiss here, A-57, is an excellent example, because nowhere in it is mentioned the relevant APA statutes. They also keep playing the refrain that all this attorney is doing is harassing the government and on a personal vendetta against individuals within it.

This kill-the-messenger strategy has been enormously successful, as this case indicates. Judge Bilby questioned our mental state. DCSO, A-1, A-22. Evidently a great many people

would not agree, which is why we have included certain exhibits in the appendix. They provide a short outline of our years of effort to force reform of FAA enforcement

Judge Bilby, as his sanction order reflects, heavily used our response to his order to show cause in order to bolster his conviction of our wrongdoing. We stand by everything we said in it — it was under oath. It is unfortunate he misunderstood so much and that we had no opportunity in an open and unhurried hearing to explain anything he did not understand or misinterpreted — which was a great deal.

Judge Bilby, before dismissal considered several matters "outside the bounds of the complaint." By doing so, under Rule 12(b)(6), the merits of the claims should have been "tested by way of motion for summary judgment." *JM Mechanical Corp. v. U.S. By U.S. Dept. of HUD*, 716 F.2d 190, 197 (3rd Cir. 1983). In those matters were: (1) An Affidavit from Peter Lynch, FAA Assistant Chief Counsel for Enforcement, citing what he contends is FAA's authority and rule for license penalties;[9] (2) Lynch's responses to the request for admissions; (3) Exhibit No. 1, certified copies of the briefs in *Wilson*; (4) Exhibit No. 2, a copy of an FAA enforcement policy published in the Federal Register but not promulgated as a formal rule; (5) copies of several complaints filed in other cases filed by counsel. Counsel should have had the right to depose Mr. Lynch and others, like John Marsh.

The bond — The bond was put up strictly for discovery purposes. Forfeiting it would constitute a sanction against the plaintiff. That is specifically forbidden by Rule 11(c)(2)(A): "Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2)."

The sanction — At least 98% of the amount claimed by

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9 The District Court ordered this during a telephone conference before the government had made a formal appearance. This is when Counsel asked if the Judge would at least let Capt. Frye submit a request for admissions. The Court agreed.

Justice Department lawyers had to be due to the request for admissions. It is a joke. The documents they complain about are those on the Marsh exhibit list. Mr. Lynch could easily verify each one in less than an hour, the spend perhaps half a day dictating his response to all the requests. All except for a mere handful, a few we knew couldn't be, were not in the request. They speak for themselves. Mr. Lynch was the one providing the responses to the requests. For Justice lawyers, 275 hours? They have so many previous motions to dismiss, that pleading could not have taken more than ten hours. For an FAA attorney (as much a part of Justice counsel's client as is Mr. Lynch), 85.5 hours? A-20.

28 U.S.C. § 1927 — Section 1927 "applies only to unnecessary filings and tactics once a lawsuit has begun." *In re Keegan Management Co., Securities Litigation,* 78 F.3d 431, 435 (9th Cir. 1996). As such, an attorney is subject to sanctions under this section for all proceedings other than the filing of the complaint. *Id.*" DCSO, A-8. The District Court's only basis for this sanction was the request for admissions, which it had approved. The only glytch came when defense counsel complained about their size and made a motion to stop discovery altogether, rather than ask the court to have plaintiff reduce their scope. (It was in response to this that the court ordered the plaintiff to post the $20,000 bond.) Every one of the requests related directly to the issues in this case. The documents were prepared for Mr. Marsh's statement. Is it proper to use section 1927 as a sanction for those requests when they were the only filing by the plaintiff after the case was initiated, and submitted for purposes of discovery, to then sanction counsel and disbar him? Was the request unreasonable and vexatious? How was it "unnecessary"? Rule 11(d) specifically provides that sanctions "do not apply to disclosures and discovery requests . . ." How is it fair to use either that rule or 1927 on such a basis?

We respectfully repeat our request that the Court, pursuant to Sup.Ct.R.15(1), order the government to file a response to this petition.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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